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MOBIKOM SDN BHD

v.

INMISS COMMUNICATIONS SDN BHD

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASHIM YUSOFF JCA
AZMEL MAAMOR JCA
[CIVIL APPEAL NO: W-02-884-2005]
C
7 AUGUST 2006

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ARBITRATION: Award - Registration and execution - Award not registered or converted to order of court - Whether not final and binding - Whether did not entitle successful party to levy execution on assets of unsuccessful party - Arbitration Act 1952, s. 27 - Companies Act 1965, s. 218

E

COMPANY LAW: Winding up - Petition - Arbitrator's award - Execution of award by way of winding up petition - Award not registered or converted to order of court - Whether only giving rise to cause of action at common law - Whether presentation of petition premature - Companies Act 1965, s. 218 - Arbitration Act 1952, s. 27

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CIVIL PROCEDURE: Injunction - "Fortuna injunction" - Execution of arbitrator's award by way of winding up petition - Injunction to restrain petition - "Fortuna principles" - Companies Act 1965, s. 218 - Arbitration Act 1952, s. 27

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This was an appeal against the decision of the learned judge refusing to issue an injunction to restrain the defendant from presenting a winding up petition against the plaintiff. The defendant had obtained an award from the arbitrator, and following that, without registering the award, served a demand on the plaintiff under s. 218 of the Companies Act 1965. The plaintiff took out a summons to restrain the defendant from proceeding with the petition, but all the same the petition was presented and interim orders thereof obtained. The plaintiff applied for stay but later withdrew the application. In the meanwhile, the learned judge dismissed the plaintiff's summons for injunction. The plaintiff applied to the High Court, and subsequently to the Court of Appeal, for a holding over injunction, and failing that, appealed against the dismissal of its summons. Before the learned appellate judges, the plaintiff argued that the defendant was duty bound to

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register the award before it could levy any execution against the plaintiff's assets, and that failure to do so had rendered the winding up petition premature and ineffective in law. The defendant retorted that the appeal was already academic, and in any case, no injunction could be issued as the plaintiff was already insolvent and there was no *bona fide* dispute as to the debt owed.

Held (allowing the appeal)

Per Gopal Sri Ram JCA delivering the judgment of the court:

- (1) The contention that the appeal is academic is without merit. This court has ample power, upon reversing orders of the judge, to restore the *status quo ante* that prevailed immediately prior to the presentation of the petition. Also, insolvency of a company is not a ground for refusing relief. (paras 12 & 14)
- (2) As for the withdrawal of the stay action, it must be borne in mind that the defendant did not register the award with the High Court, so that there was nothing to stay. In fact, even as at the date of this appeal the award had not been registered. So, the act of withdrawal was proper since the application was premature. Likewise, the refusal of an interim (holding over) injunction by this court is wholly irrelevant. The Bench hearing the application for interim relief was not concerned, as we are, with the merits of the appeal. (para 13)
- (3) The kind injunction by which an intended winding up petition is sought to be restrained is known as "Fortuna injunction". The phrase takes its name from *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* where the juridical basis for the relief was first explained. *Fortuna Holdings* made it clear that the courts have established a principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. It was also clear that two distinct branches emanate from the principle – of which the first applies in cases where the presentation of the petition may produce irreparable damage to the company and where the proposed petition has no chance of success, and the second in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure. (paras 5-7)

- A (4) An arbitrator's award, unlike an order or judgment of a court, does not immediately entitle the successful party to levy execution against the assets of the unsuccessful party. It is first necessary to convert the award into a judgment or order of court. Consequently, until it is registered and accepted as
- B a judgment by leave of the High Court, an arbitrator's award is not final and binding and liable to be challenged. It follows that the defendant's action to issue notice under s. 218 of the Companies Act without first registering the award under s. 27 of the Arbitration Act 1952 herein is premature (*Malayan Flour Mill Bhd v. Raja Lope, Tan & Co*). (para 15)
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- D (5) Since the defendant has not registered the award, all it has is a cause of action at common law. That being the case, the application by the plaintiff to set aside the award constitutes a bona fide dispute of the alleged debt. The present case thus comes within the second branch of the Fortuna principle. (para 16)
- E (6) The present case must be distinguished from such cases as *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* and *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd*. They were cases in which no *quia timet* injunctive relief was sought to restrain the presentation of a winding up petition. They were cases in which the respondent company resisted the petition on the ground that the debt on
- F which the petition was founded was disputed. In other words, the fact that the debt was bona fide disputed was raised by way of an answer or defence to the petition. (para 17)
- G (7) The High Court erred in declining to grant the plaintiff the injunction it sought. Accordingly, the appeal is allowed and the further prosecution of the petition and the carriage of the interim orders made therein were restrained. (para 19)

Bahasa Malaysia translation of headnotes

- H Ini adalah rayuan terhadap keputusan yang arif hakim kerana enggan mengeluarkan injunksi bagi melarang defendan dari mengemukakan petisyen penggulangan terhadap plaintiff. Defendan telah memperoleh suatu award dari penimbangtara, dan berikutnya,
- I tanpa mendaftarkan award, membuat tuntutan terhadap plaintiff di bawah s. 218 Akta Syarikat 1965. Plaintiff memfailkan saman bagi menghalang defendan dari meneruskan petisyen. Namun, petisyen

telah dikemukakan dan beberapa perintah interim telah diperoleh oleh defendan. Plaintiff memohon perintah penggantungan, tetapi permohonan tersebut kemudian ditarik balik. Dalam pada itu, yang arif hakim telah menolak saman plaintiff untuk perintah injunksi. Plaintiff memohon kepada Mahkamah Tinggi dan kemudian kepada Mahkamah Rayuan untuk satu perintah injunksi 'holding over', tetapi gagal. Berikutnya, plaintiff merayu terhadap penolakan samannya di atas. Di hadapan yang arif hakim-hakim rayuan, plaintiff berhujah bahawa defendan berkewajipan untuk mendaftar award sebelum boleh mengambil apa-apa pelaksanaan terhadap aset plaintiff, dan bahawa kegagalan berbuat demikian telah memudaratkan petisyen penggulungan sekaligus menjadikannya tidak berkesan di sisi undang-undang. Defendan berhujah bahawa rayuan sudah menjadi akademik, dan walau apa pun, perintah injunksi tidak boleh dikeluarkan oleh kerana plaintiff sudah insolven dan tiada pertikaian *bona fide* mengenai hutang yang ditanggung plaintiff.

Diputuskan (membenarkan rayuan)

Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

- (1) Hujah bahawa rayuan sudah menjadi akademik adalah tidak bermerit. Mahkamah ini, apabila mengakas perintah yang dibuat oleh hakim, mempunyai kuasa mantap untuk mengembalikan *status quo ante* kepada keadaan yang wujud sebelum petisyen dikemukakan. Selain itu, keinsolvenan sesebuah syarikat bukanlah penghalang untuk memberikan relif.
- (2) Berhubung penarikan balik tindakan penggantungan, harus diingat bahawa defendan tidak mendaftar award di Mahkamah Tinggi, yang bermakna tidak ada suatu apa pun untuk digantung. Malah, pada tarikh rayuan ini pun, award masih belum didaftarkan. Oleh itu, tindakan menarik balik adalah tepat oleh kerana permohonan adalah pramasa. Begitu juga, penafian injunksi interim (holding over) oleh mahkamah ini adalah tidak relevan. Panel yang mendengar permohonan relif interim tersebut tidak menaruh perhatian terhadap soal-soal merit rayuan, seperti yang dibuat oleh kami di sini.
- (3) Injunksi bagi menghalang petisyen penggulungan adalah dari jenis yang dikenali sebagai "Injunksi Fortuna". Nama ini diambil dari *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation*, iaitu kes di mana asas kehakiman relif

- A tersebut diperjelaskan buat pertama kalinya. *Fortuna Holdings* menjelaskan bahawa satu prinsip telah dibentuk oleh mahkamah di mana pengemukaan petisyen penggulungan boleh dihalang melalui injunksi jika pengemukaannya melibatkan penyalahgunaan proses mahkamah. Juga jelas bahawa terdapat
- B dua cabang pada prinsip tersebut – iaitu cabang pertama yang terpakai kepada kes di mana pengemukaan petisyen mungkin akan menyebabkan syarikat mengalami kerugian yang sukar dipulihkan dan di mana petisyen yang dicadangkan itu tidak mungkin berjaya, dan cabang kedua yang terpakai kepada kes
- C di mana pempetisyen yang hendak mengemukakan petisyen memilih untuk meneruskan dengan tuntutan bertikaianya melalui prosedur yang akan mengakibatkan kerugian yang sukar dipulih terhadap syarikat, dan tidak melalui prosedur alternatif yang lebih sesuai.
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- (4) Berlainan dengan perintah atau penghakiman mahkamah, suatu award oleh penimbangtara tidak memberi hak kepada pihak yang berjaya untuk mengenakan pelaksanaan serta merta terhadap aset-aset pihak yang tak berjaya. Adalah perlu untuk
- E terlebih dahulu menukar award kepada suatu perintah atau penghakiman mahkamah. Oleh itu, sesuatu award penimbangtara, sehingga ianya didaftarkan sebagai suatu penghakiman dengan kebenaran Mahkamah Tinggi, adalah tidak muktamad dan tidak mengikat, dan masih boleh dicabar. Ianya mengikut bahawa
- F tindakan defendan mengeluarkan notis di bawah s. 218 Akta Syarikat di sini tanpa terlebih dahulu mendaftarkan award di bawah s. 27 Akta Timbangtara 1952 adalah pramasa (*Malayan Flour Mill Bhd v. Raja Lope, Tan & Co*).
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- (5) Oleh kerana defendan tidak mendaftarkan award, apa yang ia ada hanyalah kausa tindakan di sisi undang-undang common. Dengan hal yang demikian, permohonan plaintif untuk mengenyepikan award adalah merupakan pertikaian terhadap hutang yang didakwa. Kes semasa, dengan itu, adalah dirangkumi oleh cabang kedua prinsip *Fortuna*.
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- (6) Kes semasa hendaklah dibezakan dari kes-kes seperti *Chip Yew Brick Works Sdn Bhd v. Chang Heer Properties Sdn Bhd* dan *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd*. Itu adalah kes-kes di mana tiada relif injunksi *quia timet* dipohon bagi menghalang pengemukaan petisyen penggulungan. Itu adalah kes-kes di mana petisyen dibantah
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oleh syarikat responden atas alasan bahawa hutang yang menjadi asas kepada petisyen telah dicabar. Dengan lain perkataan, fakta bahawa hutang dipertikai secara *bona fide* dibangkit melalui jawapan atau pembelaan kepada petisyen. A

- (7) Mahkamah Tinggi khilaf apabila enggan membenarkan injunksi yang dipohon plaintif. Rayuan dengan itu adalah dibenarkan. Sekaligus, pendakwaan petisyen dan pelaksanaan perintah-perintah interim yang diperolehi di sini adalah dihalang. B

Case(s) referred to:

Bina Satu Sdn Bhd v. Tan Construction [1988] 1 MLJ 533 (**refd**) C
BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors [2000] 2 CLJ 197 CA (**refd**)

Chip Yew Brick Works Sdn Bhd v. Chong Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC (**dist**)

Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation [1978] VR 83 (**refd**) D

Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 CA (**refd**)

Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai AIR [2004] SC 1815 (**refd**)

Kitnasamy v. Nagatheran [2000] 2 SLR 598 (**fol**) E

Kumpulan Perangsang Selangor Bhd v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 FC (**refd**)

Malayan Flour Mill Bhd v. Raja Lope & Tan Co [2000] 7 CLJ 288 HC (**fol**)

Mann v. Goldstein [1968] 2 All ER 769 (**refd**) F

Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd [1985] 1 MLJ 7 (**fol**)

Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 (**dist**)

PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC (**refd**) G

PP v. Chu Beow Hin [1982] CLJ 110; [1982] CLJ (Rep) 288 FC (**refd**)

Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210 (**refd**)

Stonegate Securities Ltd v. Gregory [1980] 1 Ch 576 (**refd**)

Teo Choon Mong Frank v. Wilh Schulz Gmbh & Anor [1998] 2 SLR 529 (**refd**) H

Legislation referred to:

Companies Act 1965, ss. 217, 218, 221

Civil Procedure Code [India], O. 41 r. 33 I

- A *For the appellant - Lambert Rasa-Ratnam (Foo Joon Liang with him); M/s Lee Hishamuddin Allen & Glenhill*
For the respondent - M Menon (Paul Ong & Olivia Ho with him); M/s Paul Ong & Assoc
- B *[Appeal from High Court, Kuala Lumpur; Originating Summons No: D3-24-139-2005]*
Reported by WA Sharif

C **JUDGMENT**

Gopal Sri Ram JCA:

- D [1] The plaintiff (appellant before us) and the defendant (respondent before us) entered into a contract. Later, a dispute arose between them in relation to that contract. They referred it to an arbitrator who, in his award, found for the defendant. The plaintiff was dissatisfied with the award. It applied to have the award set aside for misconduct on the part of the arbitrator.
- E “Misconduct” here is not used in a pejorative sense. In *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210 at p 211, Raja Azlan Shah J (as His Royal Highness then was) said that misconduct:

- F ... is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive.
- G But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated. In my judgment the plaintiffs’ complaint is sustainable only if the failure to do so had occasioned
- H some irregularity causing a miscarriage of justice that is apparent on the face of the award.

[2] Of this statement of the law, I said in *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788:

- I I have searched in vain for a better description of what Parliament meant by the use of the expression ‘misconduct’ in the Act of 1952.

Seven years or more have passed since I made that observation. Yet, nothing has happened in the interim that causes me to alter my view.

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[3] Let me now return to the factual mainstream. Relying on the award, the defendant issued to the plaintiff a notice under s. 218 of the Companies Act 1965 calling for the payment of the sum awarded by the arbitrator. The plaintiff failed to comply with the demand. Instead, it took out an originating summons claiming an injunction to restrain the defendant from presenting a winding up petition and from prosecuting it. Before the plaintiff's summons could be heard the defendant presented its petition. The learned judge who heard the summons dismissed it. This appeal is directed against that decision.

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[4] There is no doubt that a court has jurisdiction and power to grant an anti-suit injunction whenever the interests of justice call for or demand it. So an injunction may be issued by our courts to restrain the institution or prosecution of a suit in a foreign jurisdiction where this would lead to a multiplicity of proceedings. See, *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors* [2000] 2 CLJ 197. Similarly, a party may be restrained from presenting a winding up petition if it is found, for example, that there is a bona fide dispute about the debt on which the notice of demand issued under s. 218 of the Companies Act is based. See, *Bina Satu Sdn Bhd v. Tan Construction* [1988] 1 MLJ 533; *Stonegate Securities Ltd v. Gregory* [1980] 1 Ch 576. Once the debt on which the proposed petition is based is *bona fide* disputed it matters not that the debtor company is in fact insolvent. See, *Mann v. Goldstein* [1968] 2 All ER 769.

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[5] The kind of injunction by which an intended winding up petition is sought to be restrained is known as a "Fortuna injunction" taking its name from the case in which the juridical basis for the relief was first explained. See, *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83. In that case, McGarvie J discussed the basis on which a court acts to restrain the presentation of a winding up petition and the two branches of the principle that guide courts in the grant of an injunction. In respect of the basis, his Honour said this:

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- A When a court restrains the presentation of a winding up petition to that court it exercises part of its inherent jurisdiction to prevent abuse of its process. *Mann v. Goldstein* [1968] 1 WLR 1091, at pp. 1093-4; [1968] 2 All ER 769. Usually a court acts against abuse of its process after proceedings have been commenced.
- B Thus, existing proceedings may be stayed or dismissed, or documents delivered as a step in the proceedings may be struck out. This is done to relieve a party to the proceedings from an oppressive and damaging situation in which he has been placed through abuse of court process. The law has long recognized that with proceedings to wind up a company, intervention after the commencement of proceedings would often be too late to relieve the company of oppression and damage. The courts have recognized that irreparable damage may be done to a company merely through public knowledge of the presentation of a petition. Usually the damage flows from the loss of commercial reputation which results. The courts have also been conscious of the pressure which may be put on a company, by a person with a disputed claim against it, threatening to present a winding up petition unless the company meets his claim. While that threat exists, the company, in order to avoid the damage involved in the presentation of a petition, is pressed to meet the claim although it may have substantial and genuine grounds for regarding itself as not required to do so.
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- F The decisions of the courts have established the principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. The courts apply this principle similarly to restrain the advertisement of a petition already presented. The principle enables companies to be protected from threatened or apprehended oppression and damage from abuse of court process.

- G The basis on which the courts have intervened in the cases cited by counsel, has been that presentation of a winding up petition might of itself cause irreparable damage to the company. Given that basis, the application of the principle which entitles the courts to intervene to prevent abuse of process, depends on the existence of different elements in two distinct situations considered in the
- H authorities.

[6] His Honour went on to discuss the first branch of the principle:

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The first branch applies in cases where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. The decision by Vaughan Williams, J, to restrain the advertisement of a petition in *Re a Company* [1894] 1 Ch 349 is an example of a case within this branch of the principle. There, the petitioner had not held shares in the company for long enough to be entitled to petition for winding up as a contributory. The petition therefore had no chance of success. Later decisions have treated the case as decided on that ground. *Tench v. Tench Bros. Ltd.* [1930] NZLR 403; *Bryanston Finance Ltd. v. De Vries (No. 2)* [1976] 2 WLR 41 at p. 51; [1976] 1 All ER 25. Cases where the first branch of the principle has been applied have been cases where the petition was incapable of success as a matter of law, or as a matter of fact through lack of supporting evidence. The petition in *Re a Company* [1894] 1 Ch 349 was, as a matter of law, incapable of success. In *Charles Forte Investments Ltd. v. Amanda* [1964] 1 Ch 240; [1963] 2 All ER 940, which is discussed below, the first branch of the principle was held to apply, because the petition was incapable of success as a matter of law (Danckwerts, LJ) or through lack of supporting evidence (Willmer, LJ). *Bryanston Finance Ltd. v. De Vries (No. 2)*, *supra*, which also is discussed below, was a case where the first branch did not apply because the petition was capable of succeeding.

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[7] In respect of the second branch, his Honour said this:

I consider that there is a second branch of the principle which may apply in situations where the first branch does not.

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The second branch applies in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure. It may apply in cases where the petition, if presented, has a chance of success. In some cases both the first and the second branches of the principle apply.

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The application of the second branch is illustrated by the decision of the Court of Appeal in *Charles Forte Investments Ltd. v. Amanda*, *supra*. There, the directors of a holding company who were entitled under the articles to refuse to transfer shares, had declined to register the transfer of certain shares submitted for transfer by a minority shareholder. The shareholder informed the company that unless the directors gave an undertaking to register the shares he would present a winding up petition against the company. The proposed petition and draft affidavit in support had already been prepared. The directors did not give the undertaking and the

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- A** company issued a writ claiming an injunction to restrain the presentation of the petition. It applied on motion for an interlocutory injunction, which was refused. The company appealed. The Court of Appeal decided that an interlocutory injunction should be granted. Before the Court of Appeal, the
- B** shareholder argued that presentation of the petition could be restrained only if it were shown that the petition would not be presented in good faith for the purpose of winding up the company or that it was bound to fail regardless of the evidence to support it. The company argued that this petition was bound to fail. Another of the arguments of the company was that even
- C** if there were material on which it could succeed, a winding up petition was not the appropriate remedy. It submitted that if the petitioner had evidence to support his allegations his proper remedy would be to bring an action for rectification of the register. Willmer, LJ first considered whether, on the material before the Court, the petitioner had a chance of establishing the
- D** allegations in the proposed petition. He decided that he did not. This was an application of the first branch of the principle. Willmer, LJ, then said that if he were wrong about that, there was another ground on which the shareholder was bound to fail, because a winding up petition was not a proper remedy. He said:
- E** ‘... the winding up petition is misconceived even if the allegations contained in it could be substantiated, having regard to the existence of an alternative and more suitable remedy. It is to be observed that by bringing an action the defendant, if he has a good case, would not only more easily obtain what he is really after, but he could do so without incurring the risk of inflicting
- F** damage, possibly irreparable damage, on the company, and possibly also on other innocent shareholders.’ (Ch pp. 257-8). Danckwerts, LJ, found that the allegations in the petition were insufficient to entitle the shareholder to a winding up order and that the case could not be established that it was just and
- G** equitable to wind up the company. This also was an application of the first branch of the principle. He added that there was also the point that alternative and more appropriate remedies were available in the form of proceedings to rectify the register, which would provide the petitioner with more efficient methods of proving his allegations, if well founded. He said that he had
- H** concluded that the defendant proposed to adopt the method of a petition rather than the other and more appropriate remedies because he hoped to bring pressure on the directors to alter their attitude. This was an improper use of the process, and the company should be freed from the improper pressure being used
- I** by the defendant, and an injunction should be granted. Cross, J, the other member of the Court of Appeal, agreed with the other two judgments and added that, if the shareholder wished to make

out a case for his entitlement to transfer the shares he should bring an action for rectification of the register. He said that a winding up petition was not a form of relief which the defendant could properly invoke. He added: 'I do not say that there could never be a case in which the facts were such that it would be proper to launch a winding-up petition in respect of a refusal to register a transfer, but for the reasons which have been given by my Lords, I am satisfied that this petition is bound to fail, and I have, for my part, no doubt that the reason why the defendant chose to proceed by way of petition rather than by way of action was because he thought that more effective pressure would be brought to bear on the company in that way than if he sought his proper remedy (p. 263).

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Both Willmer, LJ, (at (Ch) p. 250) and Danckwerts, LJ, (at (Ch) p. 261) stressed that the jurisdiction to restrain the presentation of a petition was to be exercised with care and only in a clear case.

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The authorities which have been discussed illustrate the distinction between the application of the first and second branches of the principle.

[8] In a later passage McGarvie J summed up the two branches of the principle as follows:

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The first branch applies to cases where the petitioner is incapable of success as a matter of law or through absence of supporting evidence. Where the petitioner is not entitled to present a petition or where the ground alleged is not a ground which can found a winding up order, the petition is incapable of success as a matter of law. If there is no sufficient evidence to establish an otherwise sufficient ground, the petition is incapable of success for that reason. Thus the first branch applies where the proposed petition cannot succeed.

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The second branch applies to cases where there is a more suitable alternative means of resolving the dispute involved in a disputed claim against the company. They are not necessarily cases in which, as a matter of law or through absence of evidence, there is an inherent incapacity of success. They may be cases where the petitioner is entitled to present the petition, the ground is sufficient in law and there is evidence to support the ground. They are cases, though, where, due to the availability of the more suitable alternative remedy, the Court hearing the petition would in the circumstances, in the exercise of its discretion, decline to make a winding up order, at least while the

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- A circumstances remain as they are at the time of the application for an injunction. Thus the second branch applies where, because of the availability of a suitable alternative procedure, the petition is unlikely to succeed in the circumstances existing at the time.
- B [9] So much for principle. Let me now turn to the present instance. Before us the defendant resisted this appeal on a number of grounds. First, it was said that the appeal was academic because the harm that the injunction sought to prevent had already happened. The petition had already been presented and certain interim orders had been obtained. So, there was nothing
- C that we could do. Mr. Lambert Rasa-Ratnam for the plaintiff in responding to this argument cited an authority which, in my judgment, concludes the matter in his client's favour. It is *Teo Choon Mong Frank v. Wilh Schulz Gmbh & Anor* [1998] 2 SLR 529. There, the judge at first instance dismissed the appellant's
- D application for an interim injunction to restrain the respondents from passing a resolution to remove the appellant as a director of the company. The appellant appealed. By the time the appeal was heard the resolution was passed. The respondent raised the argument that the appeal was academic. The Court of Appeal of
- E Singapore speaking through LP Thean JA rejected that submission in these words:

- Counsel for the respondents suggested that it would serve no useful purpose for the appeal to be allowed, since the resolutions had been passed some months ago and the appellant had been removed as a director. There were therefore no live issues to be decided in this appeal. We rejected this argument. If we found, as we did, that the refusal of the injunction was wrong, a mandatory order could and should be made directing the respondents to cause and procure the appellant to be re-appointed a director of Forgetech. That order we also made at the conclusion of the hearing.
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- H [10] *Teo Choon Mong* was applied to a similar fact pattern in *Kitnasamy v. Nagatheran* [2000] 2 SLR 598. Chao Hick Tin JA said:

- However, because the court below refused to issue the injunction, the respondents had proceeded with the EGM and had the appellant removed as a director. Accordingly, we ordered, following the approach taken by this court in *Teo Choon Mong Frank v. Wilh Schulz Gmbh* [1998] 2 SLR 529, that the appellant be reinstated as a director of the company. In addition, we
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granted an injunction restraining the respondents, until the trial of the action or further order, from removing the appellant as a director.

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[11] Mr Rasa-Ratnam also relies on s. 69(4) which, *inter alia*, empowers this court to:

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make any order which ought to have been given or made, and make such further or other orders as the case requires.

In *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* [1997] 2 CLJ 11, the Federal Court held that the subsection empowers this court in a proper case to make consequential orders on an appeal in order to achieve complete justice between the parties. More recently, the Supreme Court of India has held that quite apart from the Indian equipollent of our s. 69(4) (being O. 41 r. 33 of the Indian Civil Procedure Code) an appellate court has jurisdiction to make such orders as the facts of the case and law applicable thereto call for. See, *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai* AIR [2004] SC 1815.

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[12] For the reasons given, the first ground of objection is without merit. In my judgment, this court has ample power, upon reversing orders of the judge, to restore the *status quo ante* that prevailed immediately prior to the presentation of the petition. However, Mr. Rasa-Ratnam took an extremely reasonable position in that he did not press for the discontinuance of the petition. He however asked for the relief in the second prayer of his summons, namely that the further prosecution of the petition and the interim orders thus far obtained on it be stayed.

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[13] That brings me to the defendant's second objection to this appeal. It is said that the events post-award demonstrate that the plaintiff is not entitled to the injunction sought in this case. The events on which reliance is placed are (i) the plaintiff's withdrawal of its application before the High Court to stay the award; and (ii) that after the judge had refused the injunction, the plaintiff failed to obtain a holding over injunction both before the judge at first instance and before a differently constituted Bench of this court. Let me take each of these. As for as the withdrawal of the stay application, it must be borne in mind that the defendant did not register the award with the High Court so that there was nothing to stay. In fact, even as at the date of the hearing of this appeal the award had not been registered. So the act of

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- A withdrawal was proper since the application was premature. Take the second point. The refusal of an interim injunction by this court is wholly irrelevant. The Bench hearing the application for interim relief was not concerned, as we are, with the merits of the appeal.
- B It is clear that for the act or acts of a litigant, post-judgment to constitute an estoppel there must be a clear election by him or her of two mutually inconsistent courses of action. See, *Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7.
- C [14] The defendant's next point of objection to the appeal is this. It is said that the plaintiff on the undisputed evidence is utterly insolvent and hence the restraint of the winding up petition is merely delaying the inevitable. In fact the defendant moved us to admit fresh evidence to prove the insolvency. That motion was dismissed with no order as to costs. As I have already said earlier
- D in this judgment the insolvency of a company is not a ground for refusing relief. In *Mann v. Goldstein*, Ungood Thomas J made that absolutely clear:
- E The second matter to mention is the companies' insolvency. Insolvency in connexion with a winding-up petition means inability to pay debts as they fall due and not a deficiency of assets as compared with liabilities. Indeed, insolvency in that sense, of inability to pay debts as they fall due, clearly appears from Mr. Mann's own affidavits. The evidence of such insolvency of both
- F companies is altogether so conclusive to my mind that I do not propose to analyse or particularise it, especially as I do not rely on it for my conclusion but come to my conclusion despite it.
- G [15] I now come to the last ground on which this appeal is being opposed. It is that there is no *bona fide* dispute as to the debt owed by the plaintiff to the defendant. This argument the defendant bases on the existence of the award. There is a complete answer to the defendant's submission on this point. It is to be found in the case of *Malayan Flour Mill Bhd v. Raja Lope & Tan Co* [2000] 7 CLJ 288 the facts of which are similar to the
- H present. The parties had entered into an agreement out of which certain disputes arose. These were referred to an arbitrator who handed down his award in two parts. In the first part he dealt with liability. He held against the appellant Malayan Flour Mill. An application to set aside the first award failed. An appeal to this
- I court was lodged. In the meantime the arbitrator handed down his award on quantum. He awarded RM2,067,863.85. An application

to remit this second award also failed and an appeal was lodged. At all times material to the action both appeals were pending. In the meantime, the respondent served on the appellant a demand under s. 218 of the Companies Act demanding the payment of the sum awarded by the arbitrator. The appellant then filed suit and sought an injunction to restrain the defendant from presenting and proceeding with any petition for the winding up of the appellant on the ground that sum demanded in dispute. Ramly Ali JC (now a judge of the High Court) granted the injunction. In his judgment, after correctly setting out the applicable principles he said this:

An arbitrator's award, unlike an order or judgment of a court, does not immediately entitle the successful party to levy execution against the assets of the unsuccessful party. It is first necessary to convert the award into a judgment or order of the court. Only then the successful party can levy execution (see *The Law and Practice of Commercial Arbitration in England* (2nd ed) by Sir Michael J Mustill and Steward C Boyd at p 416).

Parties to an arbitration agreement impliedly promise to perform a valid award. If the award is not performed, the successful party can proceed by action in the ordinary court (High Court) to obtain judgment giving effect to the award (see *Bremer Oeltransport GmbH v. Drewry* [1933] 1 KB 753 and *Bloemen v. Gold Coast City Council* [1973] AC 115).

On the strength of the above authorities, I am of the opinion that an Arbitrator's award is not final and binding and thus can still be challenged by any of the parties, until it is registered and accepted as a judgment by leave of the High Court. In this case, the defendant's action to issue notice under s. 218 of the (Companies) Act to the plaintiff without first registering the award under s. 27 of the Arbitration Act 1952, is premature, in the context of the present proceeding.

[16] I entirely agree with the law as stated by the learned judge and his approach. I would apply it here. Here too the defendant has not registered award. All it has is a cause of action at common law to enforce the award in the usual way by means of a civil suit. The application by the plaintiff to set aside the award constitutes, in my judgment, a *bona fide* dispute of the alleged debt. The present case, in my view, comes within the second branch of the Fortuna principle.

- A [17] There is a further point. The present case must be distinguished from cases such as *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 and *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95. These were cases in which
- B no *quia timet* injunctive relief was sought to restrain the presentation of a winding up petition. They were cases in which the respondent company resisted the petition on the ground that the debt on which the petition was founded was disputed. In other words the fact that the debt was bona fide disputed was
- C raised by way of an answer or defence to the petition. It is in that context that Wan Hamzah SCJ spoke these words in *Chip Yew*:

- Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.
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- E [18] But a winding up court is scarcely the tribunal before which the correctness of an arbitration award is to be tested. A special statute – the Arbitration Act 1952 – that provides for special remedies in that behalf has been specifically enacted by Parliament. Sections 217, 218 and 221 of the Companies Act, are, by contrast, general provisions for the enforcement of a debt owed
- F by a limited company. In this state of affairs it is the special statute that must override and apply. For the maxim of the law is *generalibus specialia derogant*. See, *Public Prosecutor v. Chu Beow Hin* [1982] CLJ 110; [1982] CLJ (Rep) 288, *Public Prosecutor v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285.

- G [19] For the reasons already given, I am satisfied that the High Court erred in declining to grant the plaintiff the injunction it sought. Accordingly, the appeal was allowed; the further prosecution of the petition and the carriage of the interim order
- H made therein were restrained. The defendant was ordered to bear the costs here and below and the deposit was directed to be refunded to the plaintiff.

- I [20] My learned brothers Hashim bin Dato' Haji Yusoff and Azmel bin Haji Maamor, JJCA have seen this judgment in draft and have expressed their agreement with it.
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